Supreme Court, U.S.
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No. 08-12

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD LEE BLAKES, JR.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari
To The Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the denial of habeas corpus relief by the Texas Court of Criminal Appeals is contrary to the *Strickland v. Washington*[1] standard for the effective assistance of counsel.

[1] 466 U.S. 668 (1984).

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Richard Lee Blakes, Jr., respectfully petitions for a writ of certiorari to review the order of the Texas Court of Criminal Appeals denying his state habeas corpus application challenging his aggravated kidnapping conviction and resulting 65 year sentence.

OPINION BELOW

The order of the Texas Court of Criminal Appeals denying relief is not published. App. 1.

JURISDICTION

The Texas Court of Criminal Appeals entered an order denying habeas corpus relief on April 2, 2008. App. 1. This petition is being filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

STATEMENT OF THE CASE

A. SUMMARY OF THE ISSUE

The issue concerns the Sixth Amendment right to the effective assistance of counsel at trial. Petitioner seeks a writ of certiorari on the basis the denial of habeas corpus relief by the Texas Court of Criminal Appeals is contrary to the *Strickland v. Washington* standard for the effective assistance of counsel. The record contains numerous acts of deficient conduct by counsel resulting in prejudice to petitioner.

The deficient conduct commenced early on in the guilt-innocence phase of trial. Counsel failed to file a motion to suppress or object to evidence discovered as a result of police officers' warrantless entry into and search of petitioner's home after he refused to consent to a search. Counsel failed to object to a police officer's testimony that petitioner refused to consent to a search of his residence. Counsel failed to object and made an inadequate objection to police testimony regarding inadmissible oral statements that petitioner made while in custody.

Counsel's deficient conduct continued during the punishment phase of trial. Counsel gave an incoherent summation that failed to identify mitigating factors. Counsel failed to object and move for a mistrial when the jury sent out a note

indicating that it was considering the operation of the parole law in relation to the sentence to be assessed.

Petitioner asserts the deficient acts by counsel are sufficient to undermine confidence in the outcome of his trial and there is a reasonable probability the result from either phase of trial would have been different had counsel performed as required by the Sixth Amendment. The denial of relief under such circumstances is contrary to *Strickland* and warrants this Court's attention and correction.

B. STATEMENT OF FACTS

Elishi Dotson, a 31-year-old dancer and prostitute, had been convicted and sentenced to jail for public lewdness and operating a sexually oriented business without a permit. Her stage name was "Silk." She met petitioner when she was dancing in a club. They began to date and eventually leased a townhouse together. She gave him the money that she made from prostitution.

The complainant, 22-year-old Dallaree Logan, had been a dancer and prostitute since she was 16 and was on probation for assault. Logan had changed her stage name from "Lace" to "Poison." She met petitioner through Dotson and eventually gave him the money that she made from dancing and prostitution in exchange for a place to live and help

hiring a lawyer to try to regain custody of her daughter from Child Protective Services. For two or three weeks, she had been staying at the townhouse, which had burglar bars on the doors and windows; only petitioner and Dotson had a key. A police officer testified that burglar bars on residences are common in this neighborhood.

Logan and Dotson danced nude at a club until 3:00 or 4:00 a.m. on a Saturday night in June of 1996. Petitioner and a companion were in the club. After it closed, petitioner told them not to talk to some men who were trying to talk to them in the parking lot. Thereafter, he accused Logan of talking to one of the men; she denied it, and he accused her of lying. He hit her with his fist, kicked her as she lay on the ground, and hit her in the head with a gun. It should be noted that Dotson did not mention in her written statement to the police that petitioner hit Logan with a gun. Logan said that she wanted to go home. Instead, petitioner drove her to the townhouse and said that he would not take her home until her swelling went down. He threatened to kill her if she went downstairs or to the bathroom without his permission or told anyone what happened.

Logan's eyes were swollen shut when she awoke the next morning. She told Dotson that she was too tired to go anywhere.

Logan went downstairs the next day when she

was alone. The exterior door was locked; she did not have a key and could not find a telephone. She did not leave because she was scared and could not see well.

Dotson came home and found Logan unable to move. Dotson called petitioner on his cell phone and said that she was leaving; he threatened to come home and beat her. She left anyway and called her mother and the police. She flagged down two Houston police officers at 4:45 a.m. and asked them to accompany her to the townhouse to get her clothes because she was afraid of petitioner.

The officers followed Dotson to the townhouse. She knocked on the door; petitioner opened it dressed only in shorts and, a short time later, returned with her clothes. When she asked for more of her property, he went inside, got dressed, and came outside.

Dotson told Officer G.P. Giuffre of the Houston Police Department that petitioner had beaten a woman and would not let her leave the townhouse. Giuffre asked petitioner for consent to go inside, but petitioner refused. Giuffre then obtained consent from Dotson. Giuffre and his partner went inside while Officer James Draycott of the Houston Police Department, who arrived to assist them, stayed outside with petitioner.

Draycott asked petitioner if the woman inside

the townhouse was his girlfriend. Petitioner said, "Yes. But I didn't lay a hand on her." Draycott said, "I didn't say you did." Petitioner responded, "Well, she won't say anything anyway. She won't testify."

Giuffre and his partner found Logan in a bedroom, shaking uncontrollably, with her eyes swollen shut. They found the telephones in a drawer under some clothes. Every door and window had burglar bars. Petitioner was arrested and handcuffed.

Logan was admitted to the hospital with a fractured jaw and facial bruises and contusions. Her injuries, which were not life-threatening, were consistent with being hit by a pistol or a fist or falling down on pavement.

Petitioner's girlfriend, LaShonda Keys, testified that they were together at her residence on the night in question. She and Dotson had recently argued about Dotson's involvement with petitioner.

C. PROCEDURAL HISTORY

Petitioner pled not guilty to aggravated kidnapping (habitual offender) in cause number 724983 in the 230th District Court of Harris County before the Honorable Robert Burdette. After a jury convicted him, he pled true to the enhancement paragraphs, and the jury assessed his punishment at 65 years in prison on September 19, 1996.

The Fourteenth Court of Appeals affirmed petitioner's conviction in an unpublished opinion issued on August 19, 1999. The Court of Criminal Appeals refused discretionary review on January 26, 2000. *Blakes v. State*, 1999 WL 627925 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). No challenge to trial counsel's effectiveness was presented on direct appeal.

On December 14, 2006, petitioner filed a state post conviction application for writ of habeas corpus with the convicting court. The application challenged trial counsel's effectiveness as both the guilt-innocence and punishment phases of trial. In an unpublished action, the application was denied without written order by the Texas Court of Criminal Appeals.[2] *Ex parte Blakes*, No. WR-69,549-01 (Tex.Crim.App. April 2, 2008). App. 1.

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[2] The convicting court entered findings and conclusions recommending relief be denied. The Court of Criminal Appeals did not rely on those findings and conclusions when denying relief. Had it done so, the order would have stated relief was denied (on trial court's findings without hearing). See *Ex parte Blacklock*, 191 S.W.3d 718, 719 (Tex.Crim.App. 2006) (noting Court may deny relief based upon its own review of the application).

REASONS FOR GRANTING THE PETITION

Petitioner had a right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; *Powell v. Alabama*, 287 U.S. 45 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. *McMann v. Richardson*, 397 U.S. 759 (1970).

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance. The defendant first must show that counsel's performance was deficient; that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense; that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result.

The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. Ultimately, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Petitioner need not show a reasonable probability that, but for counsel's errors, he would have been acquitted or convicted of a lesser included offense. Rather, the issue is whether he received a fair trial that produced a verdict worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Eric Dangerfield was licensed to practice law in May of 1993. Petitioner's trial began on September 16, 1996. The Houston Police Department had been investigating Dangerfield for barratry; petitioner's prosecutor, Kelly Siegler, had a copy of an offense report regarding that investigation in the State's file. Dangerfield told habeas counsel that Siegler had a deputy constable come to the courtroom during petitioner's trial to arrest him on outstanding warrants for unpaid traffic tickets. The deputy constable advised him of the warrants and told him to pay the tickets but did not arrest him.

The court fined Dangerfield for being 55 minutes late on September 19, 1996, the last day of the trial. Dangerfield told the court, "I have only recently started, I guess what you call trial work. I pretty much have just been doing personal injury, just sitting on cases." While Dangerfield had been a

lawyer for just over three years and had little to no experience trying criminal cases, Siegler was widely regarded as the best trial lawyer in the Harris County District Attorney's Office.

Dangerfield was indicted for felony theft in January of 1998 for stealing an $87,500 settlement check in a personal injury case that he settled in February of 1997 without his client's knowledge and consent. He was indicted for misapplication of fiduciary property in May of 1998 for stealing $20,000 in settlement checks from another client between April and November of 1995. The district attorney's office received another complaint in 1998 that Dangerfield was involved in a conspiracy to commit insurance fraud. He forfeited bond in both cases in November of 1998. He was disbarred by the State Bar of Texas in December of 1998.

Dangerfield was stopped on a traffic violation in Washington State in October of 2001. He told the officer that his name was Mark Pierre and presented a social security card in that name. The passenger, Karen Dangerfield, told the officer that his name was John Nantz. Ultimately, Dangerfield admitted his true identity, explaining that there were warrants for his arrest in Texas and that he had been "on the run" for three years. When the officer asked why he had credit cards in the names of John Dolan and John Nantz, he responded, "I gotta do what I gotta do." Washington state police subsequently determined that Dangerfield had used the Internet to

obtain personal information regarding these men and then applied for and received credit cards in their names. The officer confirmed the fugitive warrants and arrested him.

Dangerfield was extradited to Harris County. He was reindicted for misapplication of fiduciary property on the felony theft. He pled guilty to both misapplication indictments in June of 2002 and was sentenced to four years in prison.

Elishi Dotson flagged down two Houston police officers at 4:45 a.m. and asked them to accompany her to the townhouse that she shared with petitioner to get her clothes because she was afraid of him. The officers followed her to the townhouse. She knocked on the door; petitioner opened it dressed only in shorts and, a short time later, returned with her clothes. When she asked for more of her property, he went inside, got dressed, and came outside.

Dotson told Officer G.P. Giuffre that petitioner had beaten a woman and would not let her leave the townhouse. Giuffre decided to check on the woman. He called for assistance, and Officer James Draycott arrived.

Giuffre approached petitioner, who was not free to leave, and asked if anyone was inside. Petitioner initially denied it but, following further questioning, admitted it. Giuffre asked petitioner for

consent to go inside, but he refused. Giuffre then asked for and obtained consent from Dotson. Giuffre and his partner went inside while Draycott stayed outside with petitioner.

Giuffre and his partner found the complainant, Dallaree Logan, in a bedroom and telephones in a drawer under some clothes. They observed that every door and window had burglar bars. They took photographs of the townhouse and Logan, which were admitted in evidence.

Petitioner's counsel, Eric Dangerfield, did not move to suppress or object to the evidence discovered as a result of the officers' warrantless entry into and search of petitioner's townhouse after he refused to consent to a search. Dangerfield acknowledged in response to a questionnaire sent by habeas counsel that it was his standard practice to file a motion to suppress and, if he did not do so in this case, he "most definitely" should have, as a favorable ruling "would have destroyed the heart of the prosecution's case."

The Fourth Amendment ordinarily prohibits the police from entering a residence without a warrant. *Payton v. New York*, 445 U.S. 573, 586 (1980). The police may do so where an authorized person gives consent. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). However, a physically present occupant's refusal of consent to a police search of his residence is dispositive as to him,

regardless of the consent of a co-occupant. *Georgia v. Randolph*, 547 U.S. 103 (2006). The facts of *Randolph* and petitioner's case are similar. Randolph's wife called the police over a domestic dispute. When officers arrived, she said that he used drugs and had drugs inside the house. The officers asked him for consent to search the house, and he refused. The officers then asked for and obtained her consent to search. The Supreme Court held that Randolph's refusal to consent trumped his wife's consent, and that the evidence found in the house was inadmissible at his trial. *Id.* at 1526.

Neither this Court nor the Texas Court of Criminal Appeals had expressly decided at the time of petitioner's trial whether the police could lawfully enter and search a residence without a warrant where one physically present co-occupant consented and another refused. However, at least two state supreme courts had held that the police could not do so. *Silva v. State*, 344 So.2d. 559 (Fla. 1977); *State v. Leach*, 782 P.2d 1035 (Wash. 1989) (*en banc*).

Had Dangerfield recognized and researched this issue, he would have found persuasive authority (that ultimately became the law of the land) to support suppression of all evidence observed and seized as a result of the warrantless entry into and search of petitioner's townhouse, including Logan's testimony. His failure to file a motion to suppress or object to the admission of this evidence constituted deficient performance. *Kimmelman v. Morrison*,

deficient performance. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

Officer Giuffre testified without objection that petitioner refused to consent to a search of his townhouse. The prosecutor argued during summation that petitioner refused to consent because "he knows full well what he's guilty of and he's trying to avoid those police officers coming in and catching him in the middle of committing that crime." Dangerfield acknowledged in his responses to the questionnaire that he should have objected to this testimony.

Testimony that petitioner invoked his constitutional right not to consent to a warrantless search of his residence is inadmissible. Any adverse use of evidence that a defendant invoked a constitutional right or privilege which has been granted to him is constitutionally impermissible. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). Counsel's failure to object constituted deficient performance.

The court granted a pretrial motion in limine that the prosecutor not elicit any statements that petitioner made to the police until there was a hearing outside the presence of the jury to determine admissibility.

Officer Giuffre testified that the police decided to investigate Dotson's accusation that petitioner had beaten a woman and would not let her

leave the townhouse. He called for assistance, and Officer Draycott arrived. Petitioner, who was outside the townhouse, was not free to leave.

The State notified the court outside the presence of the jury that it intended to offer petitioner's oral statements to Giuffre. Dangerfield made a general objection that the statements were the result of "an unconstitutional interrogation;" he did not specify that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The court overruled the general objection.

Giuffre testified that he asked petitioner whether anyone was inside the townhouse, and petitioner initially denied it. Giuffre asked whether he was sure, and he admitted that someone was inside the townhouse. Giuffre asked "if he minded if we went and spoke to this female," and he responded that he did mind. Giuffre then obtained consent from Dotson to go inside.

Draycott, who stayed outside with petitioner during the search of the townhouse, also acknowledged that petitioner was not free to leave. He testified without objection that he asked petitioner if the woman inside the townhouse was his girlfriend. Petitioner responded, "Yes. But I didn't lay a hand on her." Draycott said, "I didn't say you did." Petitioner responded, "Well, she won't say anything anyway. She won't testify."

The prosecutor argued during summation that petitioner initially lied to the police about whether anyone was inside the townhouse and, thereafter, would not let them go inside because "he knows full well what he's guilty of and he's trying to avoid those police officers coming in and catching him in the middle of committing that crime." She further argued that petitioner's statements to Draycott that he did not touch the woman and that she would not testify demonstrated his consciousness of guilt. Dangerfield acknowledged in his responses to the questionnaire by state habeas counsel that he should have objected to this testimony.

Petitioner was in custody when questioned by Giuffre and Draycott, as he was not free to leave; indeed, Giuffre had Draycott stay with him during the search of the townhouse. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. 436 at 444. Giuffre interrogated petitioner about the woman inside the townhouse, and the inquiry initiated by Draycott constituted the functional equivalent of interrogation. *See Rhode Island v. Innis*, 446 U.S. 291 (1980). Thus, the admission of petitioner's oral statements to Giuffre and Draycott violated *Miranda* because he was not warned of his privilege against self-incrimination and right to counsel. Dangerfield's failure to object to the admission of petitioner's unrecorded oral statements to the police

The police discovered Logan and the physical evidence that corroborated her testimony as a result of their warrantless entry into and search of petitioner's townhouse after he refused to consent. Had Dangerfield filed a motion to suppress, and the trial court granted it, petitioner would have been entitled to an instructed verdict because the evidence would have been legally insufficient to prove an aggravated kidnapping. Had the trial court denied a motion to suppress, there is a reasonable probability that an appellate court would have reversed the conviction based on the rationale that this Court ultimately adopted in *Georgia v. Randolph*. Assuming *arguendo* that the evidence found in the townhouse was admissible, had Dangerfield made timely and specific objections to the testimony that petitioner refused to consent to a search and that he made incriminating oral statements to the police, and the trial court overruled those objections, there is a reasonable probability that an appellate court would have reversed the conviction in view of the prosecutor's emphasis on these statements during summation.

But for Dangerfield's errors, there is a reasonable probability that the evidence would have been suppressed and petitioner would have been acquitted, or that a conviction would have been reversed on appeal. An aggravated kidnapping conviction obtained under these circumstances is not worthy of confidence. Accordingly, petitioner is

entitled to a new trial and the failure by the Texas Court of Criminal Appeals to grant relief is contrary to *Strickland.*

The punishment stage commenced with the court asking Dangerfield, "Did the electricity go off in your house last night?" and asserting that he would need "300 bucks." When Dangerfield attempted to explain why he was late, the court cut him off and said, "I don't want to talk about this now."

The State offered pen packets reflecting that petitioner was sentenced to two years for indecency with a child in 1986, four years for burglary of a motor vehicle in 1990, and five years for being a felon in possession of a firearm in 1991. Dangerfield presented only brief testimony from petitioner's mother regarding his children.

Dangerfield's summation was so rambling and incoherent that it cannot be intelligently summarized. Suffice it to say, he did not clearly identify any factors that would mitigate petitioner's punishment.

While the jury was deliberating, Dangerfield acknowledged that he had not called the court that morning to say that he would be late and that he arrived 55 minutes late. He asserted that he had not eaten or slept much since the trial started. The court ordered him to pay a $300 fine that day. The court

withdrew the sanction after the jury reached a verdict.

Dangerfield acknowledged in his responses to the questionnaire that, after reading the transcript of his summation, "I must have been bothered tremendously by something."

A reasonably competent lawyer would have argued specific mitigating factors in requesting a sentence at or near the minimum of 25 years. Dangerfield should have emphasized that Logan did not sustain life-threatening injuries and there was no evidence that she had any adverse physical or psychological effects once her injuries healed; that the State did not present any victim-impact testimony, thereby suggesting that Logan was not traumatized; that Logan did not change her lifestyle (although she did change her stage name from "Lace" to "Poison);" and that the State must not have considered petitioner's prior crimes to be very serious, as it recommended sentences of two, four, and five years.

Counsel is ineffective when his punishment summation is a "rambling, incoherent discourse that was more likely to confuse than to persuade the jury." *United States ex rel Kubat v. Thieret*, 679 F.Supp. 788, 812 (N.D. Ill. 1988); *People v. Redmond*, 278 N.E.2d 766, 768 (Ill. 1972). Counsel is likewise ineffective when his punishment summation is "inadequate and so misdirected that it

cannot be treated as...a matter of reasonable judgment" and he fails to identify mitigating factors. *Osborne v. Commonwealth*, 389 N.E.2d 981, 987-88 (Mass. 1979). Dangerfield's incoherent summation that failed to identify mitigating factors constituted deficient performance.

The State offered, and the court admitted pen packets reflecting petitioner's convictions and sentences for indecency with a child, burglary of a motor vehicle, and being a felon in possession of a firearm. The court instructed the jury in the charge that it could not consider the manner in which the parole law may apply to petitioner.

The jury began to deliberate at 9:40 a.m. It sent out a note at 2:41 p.m. asking how long petitioner actually served on each prior sentence; it wanted the pen packets if the court could not otherwise provide this information. Counsel did not object and move for a mistrial on the ground that the jury was considering the manner in which the parole law applied to petitioner. The record does not reflect that the court responded to the note, which suggests that it simply provided the pen packets to the jury. The jury reached a verdict on punishment about 4:00 p.m. The court observed immediately before it reached a verdict that the jury had deliberated on punishment for six hours and fifteen minutes.

Dangerfield acknowledged in his responses to the questionnaire that it would appear that the jury was violating the court's instruction by considering the operation of the parole law; he did not object and move for a mistrial because he did not realize it at the time.

An argument that the jury should review the pen packets to determine how much time the defendant served on a prior sentence before he was released on parole improperly invites the jury to consider the operation of the parole law. The conviction was reversed in *Marshburn v. State*, 522 S.W.2d 900 (Tex. Crim. App. 1975), because the prosecutor referred to the pen packets and argued, "You say five years and two years later they are out committing another offense." This argument was harmful because it called the jury's attention to "past applications of the parole law, asking the jury to increase the punishment which otherwise would be assessed" so the defendant would stay in prison for the length of time it desired. *Id.* at 901. Argument inviting the jury to consider the operation of the parole law is so harmful that it requires a mistrial. *Mendoza v. State*, 840 S.W.2d 697, 702 (Tex. App.—Corpus Christi 1992, no pet.). The same rationale should apply where the jury considers the operation of the parole law on its own.

The jury asked to review the pen packets to determine how much time petitioner served on each prior sentence. Clearly, it decided to assess a

punishment that would compensate for the operation of the parole law. Counsel's failure to object and move for a mistrial upon learning of the jury note constituted deficient performance.

The jury deliberated for six hours and 15 minutes before it returned a verdict, despite Dangerfield's incoherent summation that failed to identify any factors that would mitigate the punishment. Its note, sent after more than five hours of deliberation, clearly indicates that it was trying to determine what percentage of each prior sentence petitioner had served so it could decide how long it wanted him to serve for this offense and then increase the punishment to compensate for the operation of the parole law.

The pen packet on the burglary of a motor vehicle conviction reflects that petitioner was sentenced to four years on June 8, 1990. The pen packet on the felon in possession of a firearm conviction reflects that the offense was committed on April 22, 1991. The jury could determine that he served less than ten months on a four-year sentence. Thus, its consideration of the operation of the parole law undoubtedly resulted in a higher punishment.

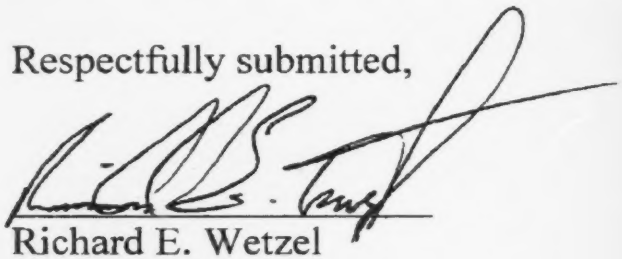
Dangerfield's deficient performance at the punishment stage undermines confidence in the 65-year sentence. Had he unsuccessfully moved for a mistrial, there is a reasonable probability that an appellate court would have reversed the sentence

and remanded for a new trial on punishment. Accordingly, petitioner is entitled to a new trial on punishment.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari, vacate the order of the Texas Court of Criminal Appeals denying habeas corpus relief, and set aside the instant conviction due to the denial of the effective assistance of counsel at trial.

Respectfully submitted,



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TEXAS COURT OF CRIMINAL APPEALS

APPLICANT: RICHARD LEE BLAKES, JR.
APPLICATION NO. WR-69,549-01

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

DENIED WITHOUT WRITTEN ORDER.

/s/ Tom Price 4-2-08
JUDGE DATE